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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 708

ANGLO CHINESE SHIPPING COMPANY, LTD.,
PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (Pet. App. 19-26),[1] is reported at 127 F. Supp. 553.

JURISDICTION

The order of the Court of Claims was entered on January 11, 1955 (Pet. App. 26). The petition for a writ of certiorari was filed on April 8, 1955.

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[1] References to the petition for a writ of certiorari will hereinafter be designated "Pet." and references to the appendix thereto as "Pet. App."; references to the original petition in the Court of Claims will be designated "P".

The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether the retention and use by the Japanese Government during the occupation of Japan, following directives issued by the Supreme Commander for the Allied Powers, of a British vessel for the purpose of laying and repairing cables for long-term use in Japanese waters constitutes a taking by the United States compensable under the Fifth Amendment.

STATEMENT

1. *Background.* On July 26, 1945, the chiefs of state of the United States, Great Britain and China issued the Potsdam Proclamation (*Occupation of Japan—Policy and Progress,* Appendix 3, Department of State Publication No. 2671, Far Eastern Series 17, p. 53) thereby setting in motion the chain of events which culminated in the surrender of Japan. This proclamation, which was subsequently subscribed by the Soviet Government, set forth the terms for the postwar treatment of Japan and called upon the Government of Japan to proclaim the unconditional surrender of all Japanese armed forces. On August 10, 1945, the Japanese Government announced its readiness to accept the terms of the Potsdam Proclamation "with the understanding that the said declaration does not comprise any demand which prejudices the prerogatives of His Majesty as a Sovereign Ruler" (*Occupation of Japan, ibid.,* Appendix 4,

p. 56). Replying on behalf of the four Allied Powers, the United States Secretary of State on the following day informed the Japanese Government (*Occupation of Japan, ibid.,* Appendix 5, pp. 57-58) as follows:

> From the moment of surrender the authority of the Emperor and the Japanese Government to rule the state shall be subject to the Supreme Commander of the Allied powers who will take such steps as he deems proper to effectuate the surrender terms.

Simultaneously with the Japanese acceptance of this interpretation (*Occupation of Japan, ibid.,* Appendix 6, p. 59), General of the Army Douglas MacArthur was appointed Supreme Commander for the Allied Powers to receive the Japanese surrender *(ibid.)*.

During the interim between the acceptance of the surrender terms by the Japanese Government and the formal signing of the Instrument of Surrender, the United States Government issued a document entitled "United States Initial Post-Surrender Policy for Japan" (*Occupation of Japan, ibid.,* Appendix 13, p. 73). This document set forth as follows the policy of this Government with respect to the status of the Japanese Government:

> There will be a military occupation of the Japanese home islands to carry into effect the surrender terms and further the achievement of the ultimate objectives stated above.* * *

The authority of the Emperor and the Japanese Government will be subject to the Supreme Commander, who will possess all powers necessary to effectuate the surrender terms and to carry out the policies established for the conduct of the occupation and control of Japan.

In view of the present character of Japanese society and the desire of the United States to attain its objectives with a minimum commitment of its forces and resources, the Supreme Commander will exercise his authority through Japanese governmental machinery and agencies, including the Emperor, to the extent that this satisfactorily furthers United States objectives. The Japanese Government will be permitted, under his instructions, to exercise the normal powers of government in matters of domestic administration. This policy, however, will be subject to the right and duty of the Supreme Commander to require changes in governmental machinery or personnel or to act directly if the Emperor or other Japanese authority does not satisfactorily meet the requirements of the Supreme Commander in effectuating the surrender terms. * * * [*Ibid.*, at pp. 74, 75.]

Full and prompt restitution will be required of all identifiable looted property. [*Ibid.*, at p. 80.]

Meanwhile, the first units of the occupying forces were landing in Japan (*Occupation of Japan, ibid.*, p. 5). Although these units as well as the bulk of the occupation army which later arrived consisted of United States troops, some 45,000 troops of the British Commonwealth eventually landed in Japan to take part in the occupation (*Occupation of Japan, ibid.*, p. 15).

On September 2, 1945, the Instrument of Surrender (*Occupation of Japan, ibid.*, Appendix 8, p. 62) was signed in Tokyo Bay by Douglas MacArthur in his capacity as Supreme Commander for the Allied Powers; by two Japanese officials "in behalf of the Emperor of Japan, the Japanese Government and the Japanese Imperial General Headquarters"; and by nine persons as representatives of the various individual United Nations governments. Admiral Chester W. Nimitz signed as the United States representative.

On December 27, 1945, the United States, the United Kingdom and the Soviet Union, with the concurrence of China, announced the establishment of a Far Eastern Commission to be composed of representatives of eleven United Nations governments for the purpose of formulating "policies, principles, and standards in conformity with which the fulfillment by Japan of its obligations under the Terms of Surrender may be accomplished," as well as for the purpose of exercising certain other broad supervisory powers over the occupation of Japan (*Occupation of Japan, ibid.*, Appendix 12,

pp. 67-73). The Supreme Commander was recognized, however, as "the sole executive authority for the Allied Powers in Japan" (*ibid.*, at p. 72). In implementing the policy decisions of the Far Eastern Commission, the function of the United States Government was to be as follows:

> 1. The United States Government shall prepare directives in accordance with the policy decisions of the Commission and shall transmit them to the Supreme Commander through the appropriate United States Government agency. The Supreme Commander shall be charged with the implementation of the directives which express the policy decisions of the Commission. [*Ibid.*, at p. 70.]

On July 18, 1946, the Far Eastern Commission published a Policy Decision entitled "Restitution of Looted Property," to which minor amendments were made by a further Policy Decision of October 10, 1946 (*Activities of the Far Eastern Commission*, Appendicies 27 and 28, Department of State Publication No. 2888, Far Eastern Series 24, pp. 80-83). These Decisions outlined measures to be taken looking to the restoration to Allied countries of ships found in Japanese waters which were identified as having been registered in Allied countries at the time of their seizure. In order that such ships might be returned in a condition substantially similar to that at the time of their seizure, necessary repairs and refitting were to be carried out and the cost charged to the Japanese Government.

It was not until June 19, 1947, that the Far Eastern Commission published a Policy Decision on "Basic Post-Surrender Policy for Japan" (*Activities of the Far Eastern Commission, ibid.*, Appendix 5, p. 49). Meanwhile, general elections had been held in Japan in April, 1946 (*Occupation of Japan, supra,* Appendix 30, p. 140) and a new Japanese constitution had been officially promulgated on November 3, 1946 (*Activities of the Far Eastern Commission, supra,* p. 15). The Policy Decision enunciated the following policy with respect to the relation of the occupying powers to the Japanese Government (*Activities of the Far Eastern Commission, ibid.*, Appendix 5, at pp. 51-52):

> The authority of the Emperor and the Japanese Government will be subject to the Supreme Commander, who will possess all powers necessary to effectuate the surrender terms and to carry out the policies established for the conduct of the occupation and the control of Japan.
>
> The Supreme Commander will exercise his authority through Japanese governmental machinery and agencies, including the Emperor, but only to the extent that this satisfactorily furthers the objectives and policies stated herein. According to the judgment and discretion of the Supreme Commander, the Japanese Government may be permitted to exercise the normal powers of government in matters of domestic administration, or the Su-

> preme Commander may in any case direct action to be taken without making use of the agencies of the Japanese Government.

On April 28, 1952, the multilateral Treaty of Peace with Japan (see copy attached to certified transcript of record) entered into force and the office of the Supreme Commander for the Allied Powers ceased to exist on that date (17 F.R. 3689).

2. *The instant proceeding.* In this suit, petitioner, a British corporation, is seeking just compensation under the Fifth Amendment for the alleged taking for public use by the United States of petitioner's vessel, the SS "Josephine Moller," during the occupation of Japan. The vessel had been captured by the Japanese Government in the harbor of Hong Kong early in World War II (P. 2). She was renamed the "Sagami Maru" and appropriated to the use of the Japanese Government, which retained the vessel throughout the balance of the war (P. 2). In December, 1946, the vessel was located at Yokohama and identified as looted property (P. 3). See *supra,* pp. 4, 6. The British Ministry of Transport and, through it, the petitioner were notified to this effect (P. 3).

On January 10, 1947, however, General Headquarters, Supreme Commander for the Allied Powers, sent a Memorandum (Schedule A, P. 7 and 8) to the Imperial Japanese Government directing that:

> 1. The SS "Sagami Maru" ex British cargo vessel, SS "Josephine Moller", will be retained in Japanese waters for a period of one

year to be operated for the purpose of laying and repairing submarine cables, as directed by the Supreme Commander for the Allied Powers. * * *

2. It is directed that the Japanese Ministry of Communications assume responsibility for the operation of the vessel, make the necessary arrangements to man and outfit the ship for cable laying operations and proceed with work already approved by General Headquarters, Supreme Commander for the Allied Powers. * * *

This Memorandum was subsequently amended by Memoranda (Schedules B and C, P. 8-10) extending the time for the retention of the vessel by the Japanese Government, and by Memoranda (Schedules D through G, P. 11-18) directing the refitting of the vessel and its return to the British Government.

On August 4, 1950, the "Josephine Moller" was formally delivered to the Government of the United Kingdom at Hong Kong by the Japanese Government. The delivery was acknowledged by a "Receipt for Restoration of Property" (Schedule H, P. 19) signed by the Japanese captain of the vessel "On Behalf of the Japanese Government" and by the British Governor of Hong Kong "On Behalf of the Government of the United Kingdom." This document attested

* * * to the fact that the authorized representative of the Japanese Government has on this date, at Hong Kong, China delivered and

> transferred, and thereby restored the SS "Josephine Moller" (Japanese Name "Sagami Maru") together with the title thereto and custody thereof to the Government of the United Kingdom and such Government has accepted delivery, restoration, ownership and custody of the property from the Japanese Government, and agrees to take possession of the same immediately. * * *
>
> 1. Nothing herein set forth, or done pursuant hereto, will be permitted to prejudice any other rights or claims that the Government of the United Kingdom may have against the Japanese Government with respect to the property: SS "Josephine Moller".

On the same date the vessel was transferred over to her former owner, petitioner herein (Schedule I, P. 20).

In its complaint filed in the Court of Claims on October 28, 1953, petitioner, in addition to alleging the foregoing, asserted that the Supreme Commander for the Allied Powers, acting for and in behalf of the United States Government, had failed and refused to pay petitioner any compensation for the requisition of its vessel and for having deprived petitioner of the use thereof (P. 5). The complaint sought recovery of about $450,000 plus interest as just compensation for the requisition of the vessel (P. 6). As stated by the Court of Claims (Pet. App. 19):

> The suit is brought against the United States only, on the theory that it was in control of the forces occupying Japan, although other nations participated in the occupation, and that, therefore, it is liable for any acts done by the occupying powers.

The Court of Claims granted the Government's motion to dismiss for lack of jurisdiction, holding that the requisition of the vessel had been not by the United States but rather by the Japanese Government and consequently that the occupying powers including the United States were not liable for the requisition (Pet. App. 25-26).

ARGUMENT

The broad questions of international and constitutional law which petitioner seeks to raise in this case were not reached by the Court of Claims since their resolution was unnecessary on the facts as found by that court. On the facts as found, the case raises only narrow questions which, we submit, were properly resolved by the Court of Claims. Moreover, these questions have no general or prospective importance; the Treaty of Peace with Japan of April 28, 1952, terminated the office of Supreme Commander for the Allied Powers and, so far as we have been able to ascertain, there are no other pending cases raising these questions.

1. The findings by the court below that petitioner's vessel was at all times retained by the

Japanese Government for its own use and never came into the actual possession or use of the Allied Powers is dispositive of this case and makes unnecessary resolution of the broad questions sought to be raised by the petition. The court found (Pet. App. 25-26):

> * * * When the Japanese conquered Hong Kong they seized the vessel and it remained in their possession until it was returned to its owners. It is true the Supreme Commander directed them to retain it, but this direction was issued only because the Japanese Government was powerless to act except with the approval of the Supreme Commander. * * *
>
> The laying and repairing of [the] cables was for the benefit of Japan. Japan itself outfitted the vessel and manned it and used it in laying and repairing the cables. The responsibility for the use of it in so doing is Japan's responsibility. The cables were not for temporary use by the Allied Powers only during their occupation; they were for long-time use extending far beyond the period of occupation.

Based upon these findings, the court held that the retention or, to use petitioner's phrase, the "requisition" of petitioner's vessel was accomplished by the Japanese Government itself, and that during the period of retention the vessel was devoted to the rehabilitation of Japan herself and not to uses primarily beneficial to the occupying powers. Consequently, as the Court of Claims

held, the cost of laying and repairing the cables which includes the costs for the use of petitioner's vessel "must be borne by Japan." (Pet. App. 26). It was further held that the fact that many of the actions of the Japanese Government were approved or even directed by the Supreme Commander for the Allied Powers did not affect their character as acts of the Japanese Government (Pet. App. 25). The conclusion that there had not been a taking by the United States necessarily followed without the necessity of considering any broader issues.[2]

2. Petitioner does not dispute the fact that actual possession remained at all times in the Japanese Government; it contends rather that "The law recognizes that there can be a requisition of the *use* of a vessel with or without possession" (Pet. 12), and that the United States Government, either directly or through its participation in the

---

[2] Even if it be assumed that there was a requisition by the Supreme Commander for the Allied Powers, it does not follow that the United States would be liable therefor. Petitioner's theory that the United States would be liable because General MacArthur was not only the Supreme Commander for the Allied Powers but also Commander in Chief of the American Forces in Japan, and as such an agent for the United States Government, has been rejected by this Court. Cf. *Hirota* v. *MacArthur*, 338 U. S. 197, where this Court held that acts done by General MacArthur in his role as Supreme Commander for the Allied Powers—and the directives here were issued in that capacity—were done "as the agent of the Allied Powers," and not as the agent of the United States Government. See also *Lake Ontario Land Development and Beach Protection Association, Inc.* v. *Federal Power Commission*, 212 F. 2d 227, 233 (C.A.D.C.), certiorari denied, 347 U.S. 1015.

occupation as one of the Allied Powers, had such use of its vessel. But the Court of Claims has found as a matter of fact that the use of the vessel was devoted by the Japanese Government to its own long run use and only incidentally to the benefit of the Allied Powers (Pet. App. 25-26); consequently, even if petitioner's legal proposition is correct it cannot aid its case.

3. Petitioner appears to urge that, although the vessel was retained and used by the Japanese Government, the United States nevertheless is liable since, according to petitioner, the Japanese Government during the period in question was not a separate entity and was instead a mere projection of the will of the Supreme Commander for the Allied Powers (Pet. 15). However, the publications of the Department of State, particularly those portions set out, *supra,* pp. 3-4, clearly demonstrate that despite the control and supervision of the Supreme Commander for the Allied Powers the Japanese Government was nevertheless regarded by the State Department as a sovereign entity capable of performing acts for which it would be responsible and for which it could be held accountable. And it is established that whether a foreign government is to be regarded as a sovereign entity and "as representative of a foreign sovereign state is a political rather than a judicial question, and is to be determined by the political department of the government." *Guaranty Trust Co.* v. *United States,* 304 U. S. 126, 137; *United States* v. *Pink,* 315 U. S. 203, 229.

Any doubts as to the State Department's views as to the sovereignty of Japan are put to rest by that Department's certification in *Japanese Government* v. *Commercial Casualty Ins. Co.,* 101 F. Supp. 243 (S. D. N. Y.). It was there certified in a letter dated October 4, 1951, and signed by the Assistant Legal Advisor of the Department of State (see 101 F. Supp. at 250):

* * * * *

> that at the time of the commencement of this action, *the Japanese Government was a sovereign government recognized as such by the Government of the United States;*
>
> that the Supreme Commander for the Allied Powers (SCAP) was appointed, authorized and directed by the Allied Powers concerned with the occupation of Japan to direct and control the acts and conduct of the Japanese Government and of Japanese nationals; * * * [emphasis supplied].

The court in that case considered itself bound by the quoted certification as an expression of the views of the political department of the government on a political question (*ibid* at p. 246; cf. *Ex Parte Peru,* 318 U. S. 578; *Compania Espanola* v. *Navemar,* 303 U. S. 68), and held that the Japanese Government was an entity capable of bringing suit in the United States district courts (101 F. Supp. at p. 246):

> With the recognition of the Japanese Government by the United States there goes ac-

knowledgment that it "will be permitted to hold its place and rank, in the character of an independent political organism." Moore, *International Law Digest*, Vol. 1, p. 72. That "the government of Japan does not have diplomatic representation in the United States * * *" * * * does not alter its status as a sovereign government recognized as such by the United States government.

The fact that the Japanese Government during the occupation had sufficient recognized identity to bring suit in its own behalf in the United States is persuasive that it had capacity to perform acts in furtherance of its own rehabilitation and to take responsibility for those acts. Indeed, there is no doubt that petitioner has a remedy against the Japanese Government; petitioner has merely to avail itself of the remedy clearly authorized by the terms of the "Receipt for Restoration of Property" (Schedule H, P. 19), of asserting its claim against the Japanese Government through its own government, the United Kingdom, or alternatively of suing directly in the Japanese courts, as permitted by Article 12 of the Peace Treaty.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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